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No. 538

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 27447

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CAMPISI,

Petitioner-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING
(Upon Recall of Mandate)

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UNITED STATES COURT OF APPEALS
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To the Honorable Henry J. Friendly, Irving R. Kaufman, and Paul R. Hays, Circuit Judges:

This Court having recalled its mandate in the above entitled appeal by order of September 19, 1962, Petitioner Anthony Campisi, a defendant-appellant in the above entitled appeal, respectfully prays that a rehearing be granted to reconsider the decision and judgment of this Court rendered and filed July 23, 1962, which affirmed a judgment upon a jury verdict in the United States District Court for the Southern District of New York (Archie O. Dawson, D.J.), which convicted the defendant-appellant of violations of 18 U.S.C. §§495 and 2.

In support of this petition for rehearing, the following grounds and reasons are respectfully submitted*:

* Because the parties' respective printed appendices in this Court do not, even when read combinedly, include all those parts of the record which we find it necessary to discuss in this petition for rehearing, we are obliged to ask the Court's indulgence for our use herein of the full stenographic transcript of the trial in this case. Our page references to the testimony, therefore, will be both to said transcript ("Tr. ") and to the printed appendices ("D a" refers to appellants' Appendix, " a" refers to the Government's Appendix).

This Court's opinion affirming the judgment of conviction stated that the Court was not reaching the merits of questions raised by the instant petitioner and certain other defendants addressed to the length of the indictment, propriety of the joinder of defendants and offenses, and the denial by the Trial Court of motions to sever. These questions were not being reached, this Court stated, because it held that the objections were waived in the Trial Court.

It is to these questions which the Court declined to reach that this petition for rehearing is exclusively addressed.

By way of preliminary, let us indicate in a general way the setting in which this petition for rehearing will argue the questions above mentioned: We hope to show in this petition that, inasmuch as the questions referred to partake of the quality of due process constitutionality, the defense motions were not ones that could be waived in the manner determined by this Court but were in the nature of motions addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12 of the Federal Rules of Criminal Procedure. We shall ask the Court to reconsider, also, its apparent finding that petitioner Campisi, through his trial counsel, must in some manner bear the disadvantage of a statement by counsel for one of the other defendants at the trial which this Court characterized as being to the effect "that the Court would be fully justified in denying it [the motion for severance] as untimely".

The defendants who stood trial in this case, including petitioner Campisi, were tried under an indictment containing 540 Counts involving alleged forging and uttering of allegedly stolen United States Government Bonds. This Court's opinion in the recently decided appeal herein did not discuss the remarkable statistical actualities of this trial whereby this 540 Count indictment was washed down to a tiny fraction of that entire number of Counts when the

time finally arrived for submission of the case against petitioner Campisi to the jury. This washing down of the prodigious original number of counts did not occur, moreover, as we show in detail *infra*, until after the entire mass of "evidence" relating to the entire 540 Counts had been spread before the jury; indeed all of this evidence was permitted to remain for consideration by the jury even after all but a very small number of the counts had been dismissed by the Trial Court. Perhaps this Court's choice not to take notice of these statistical actualities (the details will be presented in a moment) was owing to the Court's aforementioned conclusion that the issues posed by the size of the indictment had been waived by the defense; or perhaps the issue was not brought vividly enough to the Court's attention in Campisi's appeal herein, where the statistics which we now desire to present were not developed in a detailed manner.

The statistics to which we refer, as to the way in which the 540 Counts were ultimately washed down to a tiny percentage of the original total, are as follows, as affects petitioner Campisi:

The original 540 Counts consisted of 538 substantive Counts and two conspiracy Counts. Of these 538 substantive Counts, Campisi in the first place was never even named in 404 of them. Campisi was orginally named only in Counts 405 through 471 (forgery) and Counts 472 through 538 (the corresponding uttering Counts). Since the use of separate Counts for the alleged forgeries and utterings worked a mere arithmetical doubling of the actual alleged offenses, it may be taken for the purposes of the present discussion that Campisi was originally named in 67 substantive counts. Of the two conspiracy counts, Campisi was named in only one of them (Count 540).

Of the 67 (or 134) original substantive Counts against Campisi, the only ones finally submitted to the jury were 17 forgery Counts plus the 17 corresponding uttering Counts

(Counts 455 through 471, and Counts 527 through 538, respectively) (Tr. 1003). We shall show *infra* that even as to these 17 (or 34) Counts which were sent to the jury, five of them (forgery), or ten (to include the uttering Counts), should absolutely have been dismissed by the Court for failure of proof (Counts 458 through 462 and Counts 525 through 529, respectively)—a point which was apparently not brought to this Court's attention at all in Campisi's appeal herein. Thus, at most, the Government's "case" against Campisi actually never involved more than 12 (or 24, if such 12 Counts are doubled) Counts, as to which Campisi was obliged to stand trial under an indictment naming numerous other defendants and charging 538 substantive offenses. And, even as to these 12 Counts, the actual alleged forgery-uttering incidents involved were comprised of only three or perhaps four distinct transactions (see the tabular indictment breakdown of Counts 455 through 457, and 463 through 471, in the appellants' printed Appendix in this Court, pp. D52a-54a).

It is thus not unfair to say that Campisi had to stand trial under an indictment containing 538 substantive Counts, on what ultimately turned out to be, in actuality, three or perhaps four distinct alleged offenses.

As for the conspiracy Count naming Campisi (Count 540), this was dismissed by the Trial Court. We shall show *infra* that this Court apparently did not take into consideration certain persuasive record indications (to which we shall refer) that the conspiracy Counts were dismissed by the Trial Court not merely for simplification, as this Court apparently thought, but because the proof as to those Counts was deemed by the Trial Court to be unsatisfactory. This last is especially important for our instant petition for rehearing, because this Court's conclusion that "the conspiracy Counts were amply proved and were dismissed only to simplify the issues" enters weightily into the overall picture which we are herewith praying the Court to

reconsider from the standpoint of whether Campisi's conviction should be reversed for violation of his rights of severance and to be free of prejudicial joinder.

Before presenting the further details as to the ways in which petitioner Campisi was prejudiced by the denial of a severance under this prodigious indictment, we pause to note the circumstances of the defense motions in the District Court for relief addressed to the joinder aspects of the indictment and its extraordinary scope. This portion of the trial proceedings is printed in full in the Government's appendix in the appeal herein at pp. 2a to 10a. It is true, as this Court noted in its opinion in this appeal, that counsel for one of the other defendants (Mr. Direnzo, representing defendant Sanantonio) acknowledged to the District Court that the Court "would be perfectly justified" in denying the motion for severance—which was being made for the first time on the morning of the commencement of the trial, January 2, 1962—on the ground that the application was not timely (*id.*, 2a-3a). However Mr. Direnzo qualified this concession by stating also to the District Court that denial of the motion for untimeliness would be justified "in the formal course of events" (*id.* 2a). In other words, Mr. Direnzo was requesting the Court to consider the extraordinary circumstances presented, and not to treat the motion for severance in an ordinary manner as regards the issue of timeliness. Furthermore, when it came time for counsel for the instant petitioner Campisi to present his own motion for severance, there was not even any such qualified concession as we have just described *per* Mr. Direnzo. Campisi's attorney, Mr. Bozza, addressed the Trial Court at *id.* 7a-9a; this, as noted, was on the morning of January 2, 1962. Mr. Bozza informed the Court that Campisi had not been brought into the case until the unsealing of a superseding indictment (which was late in November, 1961—see Appellants' printed Appendix herein, Docket entries, at D1a); that he (Mr. Bozza) had been almost continuously engaged in another trial from shortly after the time of Campisi's

arrest until shortly before the Christmas holidays; that on December 27, 1961 he (Mr. Bozza) had made known to the District Court that he was not prepared to proceed with the trial because of the press of his then recently concluded other engagements and that the Judge on that occasion had instructed Mr. Bozza to make his application to the Judge who should be assigned to the trial; and that denial of a severance in view of the enormous scope of the indictment would intensify the difficulties faced by the Campisi defense in being required to proceed to trial with all of the other defendants under the entire indictment. See Government's Appendix in this appeal, pp. 7a-9a.

Thus, Campisi's counsel in the Trial Court not only made no concession, qualified or otherwise, on the issue of untimeliness, but he vigorously urged the justness of granting a postponement and a severance to Campisi on grounds distinctly applicable to that defendant. While this Court's opinion in the appeal herein did note (with seeming reference to Campisi) that the District Judge was informed of counsel's press of other engagements and of the failure of predecessor counsel to make a timely motion, the opinion apparently did not take into account the fact that Campisi had not even been brought into this case until nearly the end of November, 1961, which places the matter in a light more favorable to Campisi. It should also be noted that the District Judge who at that time (late Nov. 1961) was assigned to the matter had set a date for the making of motions which came very crowdedly soon thereafter (December 4, 1961), at which time Mr. Bozza, who as seen had just entered the case, was unavoidably occupied with prior tasks in the other case above mentioned.

While there appears to be little express authority on the point, it would seem that this Court has the power to review, on the test of abuse of discretion, rulings of a District Court declining to entertain a motion under Rule 12 on the ground of untimeliness. Cf. *Cleaver* v. *United States*, 238 F. 2d 766, 769 (C.A. 10, 1956).

We turn now to the details of the extraordinary course of the trial proof herein, from which exposition we hope that this Court will agree with us that the Trial Court's refusal to entertain the Campisi motion for severance as untimely not only presents the question of abuse of discretion but (as above mentioned) also the question of whether it was error in any event to decline to consider the motion inasmuch as what was actually presented was a constitutional issue giving rise to the question of whether the indictment stated an offense and was therefore subject to a motion to dismiss at any time.

First, of the three accomplice witnesses upon whom the Government relied to prove both the substantive and conspiracy counts, two of them, Levine and Parks, did not inculpate petitioner Campisi in any way. Levine's only mention of Campisi was that he had met him in the course of gambling activities (no date given) (Tr. 186). In fact, at Tr. 377 Levine specifically stated that in all the activities to which he had testified he never had any "conversations, transactions or dealings whatsoever with Anthony Campisi". Nor had Levine ever met the third accomplice witness, Bartkovsky, whom the Government sought to link with Campisi (Tr. 315). Also, the prosecutor stated for the record that nothing connected with the testimony of Levine and Parks was being offered with respect to Campisi (Tr. 210); compare also the prosecutor's statements at Tr. 203-205, declaring that exhibits offered in connection with Levine did not relate to Campisi. Again, when the accomplice witness Parks testified (Tr. 409-464) there was not one word about Campisi. All of this testimony by Levine and Parks, and the collateral testimony relating to the transactions in which those two accomplice witnesses allegedly participated, accounted for 334 of the 538 substantive Counts, which had nothing to do with Campisi but which were brandished before the jury *via* this astounding use of the Government's right of "joinder".

Second, there were an additional 70 substantive counts which likewise had nothing to do with Campisi, *viz.*, Counts 335 through 404, which involved only the defendants Bartkofsky and Donatiello.

Third, and even more striking, even the Counts which supposedly were to be shown to involve Campisi, *viz.*, Counts 405 through 538, turned out to be almost entirely composed of sound and fury, as we earlier intimated. These latter 134 substantive Counts washed out at the trial as follows:

One hundred of these 134 Counts were dismissed by the Trial Judge as relating not to Campisi but to another defendant, Donatiello (forgery counts 405 through 454, and uttering Counts 472 through 521). See Tr. 799-803, 807, 868, 1003.*

After the elimination of the above mentioned 100 Counts against Campisi, there remained in the case against him, as

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* The testimony last cited in the text above shows that the Trial Court agreed with Campisi's counsel that Bartkofsky had testified he obtained the bonds involved in these counts from Donatiello, not Campisi, the Trial Court stating that his written notes so indicated, as did also the written notes of Campisi's attorney, Mr. Bozza. We have checked Bartkofsky's testimony on this point, and we must be candid in informing this Court that the stenographer's notes do not unequivocally either support or negate the recollection of the Trial Court and Mr. Bozza. During the direct examination of the accomplice witness Bartkofsky, as likewise during the examination of the other accomplice witnesses, the prosecutor was continually showing various bonds to the witnesses, and from time to time, just as was inevitably to be expected under this monster indictment, the witnesses' responses stand upon the stenographic record ambiguously as regards any attempt to pin those responses into precise connection with particular bonds. This confusion in the testimony was aggravated by the Government's intermingling of its substantive and conspiracy proofs, with various bonds from among the hundreds in the case being shown to witnesses and offered in evidence. A prime example of this confusing method of "proof" is found in the Bartkofsky testimony at Tr. 624-632. It is impossible to determine from the stenographic transcript just which bonds Bartkofsky was referring to when he said at Tr. 632 that he got certain bonds "from Campisi", although on the preceding page (Tr. 631) the witness was apparently being questioned about the bonds involved in forgery Counts 405 to 454.

earlier mentioned, 17 forgery plus 17 uttering Counts (Numbers 455 through 471, and 527 through 538, respectively) (Tr. 1003). However, of these 17 (or 34) Counts, there were 5 forgery and 5 uttering Counts which should plainly have been dismissed by the Trial Court just as had been the 100 Counts above mentioned. These last mentioned 5 (or 10) Counts were numbers 458 through 462, and 525 through 529, relating to the so called LaCorte bonds. Bartkofsky himself had testified that as to these LaCorte bonds he could not remember at all whether he had cashed them for Campisi, and he expressly stated on the witness stand that he wanted to "leave them out" (Tr. 733-734; see also Tr. 776-777). The Trial Court had apparently overlooked or failed to recall accurately this testimony of Bartkofsky concerning the LaCorte bonds, and we regret that these facts were not brought to this Court's attention at the time of Campisi's appeal herein. We mention these facts now because they help still further to show how egregiously Campisi was prejudiced under this stupendous indictment of 538 substantive Counts, when, as we said earlier, he should at most have been tried under 12 of the forgery Counts and their corresponding uttering Counts—which, as also noted earlier, in any event involved only three or at most four distinct transactions.

Even more seriously prejudicial to Campisi's chance for a fair trial of the distinct issue of his own guilt or innocence under this remarkable indictment, were the circumstances which developed at the trial in connection with the two conspiracy counts (numbers 539 and 540). Campisi was named only under the second of these conspiracy counts (number 540). Ultimately, the Trial Court dismissed both of the conspiracy counts (Tr. 1002-1003). In all respectfulness, we believe it can be demonstrated that this Court was incorrect in the statement in its opinion in the appeal herein that "The conspiracy Counts were amply proved and were dismissed only to simplify the issues". It was precisely in connection with these conspiracy counts, and the

Government's efforts at "proof" thereof, that the Trial Court most vigorously and repeatedly expressed its exasperation over the hopelessly confused development of those "proofs". Thus, rather early in the trial, in connection with the so called "Marron" bonds, the prosecutor offered those bonds on both conspiracy counts, but in the course of colloquy, the Court became convinced that they could not be received in evidence against Campisi under the conspiracy count in which he was named. (Count 540). See Tr. 490-493. Similarly, during the testimony of the accomplice witness Bartkofsky, the Court was obliged to reject the prosecutor's efforts to "prove" an alleged conspiratorial linkage affecting Campisi in connection with certain alleged transactions in New Jersey, the Court remarking that the conspiracy had not yet been proved (Tr. 627); and at Tr. 640 the prosecutor apparently himself agreed to drop this phase of the case against Campisi—this entire episode involving Bartkofsky and the alleged New Jersey transactions appears at Tr. 617-640.

Similarly, but even more profoundly confusing, the Government's efforts to prove the conspiracy count against Campisi in connection with certain alleged happenings in Middletown, New York should be noted. See Tr. 635-648, where (especially at Tr. 646 et seq.), the Trial Court's exasperation reached probably its highest point during the entire trial over the Government's confusing use of the conspiracy "proofs".

But the worst confusion of all in connection with the conspiracy phase of the case occurred in connection with the so called Frankuchen bonds which the prosecutor attempted to connect with Campisi on the conspiracy count (No. 540). This "Fankuchen" phase appears at Tr. 651-671. At the end of this portion of the testimony concerning the "Fankuchen" bonds the Trial Court was prompted to remark, in denying a motion by one of the other defendants to strike the testimony, that "I dont know what you are worried

about. He [the prosecutor] didn't seem to get anywhere" (Tr. 671).

During the extended colloquy which occurred subsequently upon the motion to dismiss at the end of the Government's case, the Trial Court repeatedly expressed its dissatisfaction with the conspiracy phase of the case, and we respectfully submit that nowhere in the record did the Trial Court manifest its belief that the conspiracy Counts had been proved. See Tr. 797-868.

Notwithstanding the District Court's dismissal of all but a small fraction of the substantive counts, and its dismissal of both of the conspiracy counts, and notwithstanding the Court's express ruling prior to the summations that "I take it that all counsel will argue on only the Counts that are still in the indictment" (Tr. 870), the Court subsequently made rulings whose necessary effect was that the jury would be permitted to consider all of the evidence which had been introduced by the Government on all of the original 540 Counts of the indictment, over the vigorous objection of the defense (Tr. 1129-1130, Tr. 1158, Tr. 1197). We respectfully urge that the statement in the last sentence of this Court's opinion in the appeal herein that "It was not error to send to the jury the bonds that were the subject of Counts that were later dismissed because no motion to strike them was made and because, as proof that Campisi had committed similar acts, they remained admissible to show his knowledge, motive and intent", does not effectively meet Campisi's contention of prejudice in this regard in view of the overall circumstances which we have above described concerning the denial of Campisi's motion for severance.

Thanks to the leaving in of all of this evidence which had been received under the dismissed Counts, the jury case against the petitioner Campisi was allowed to include a heterogeneous mass of inflammatory, guilt-associative evidence emanating the aura of a conspiratorial "ring"—a

"ring" with which the evidence under the relevant remaining Counts against Campisi did not actually link him in any way except in regard to the few Bartkofsky transactions to which we have above referred.

For a case which, when washed down to its ultimate maximum proportions as to Campisi, ended up involving not more than three or four actual distinct alleged transactions, the Government blazoned its way, from the Grand Jury stage onward and down through the Trial Jury's conclusion of its deliberations, with this stupefying aggregation of 538 substantive counts and two conspiracy counts, which latter in turn were so incomprehensibly interwoven with the aiding and abetting aspects of the substantive counts that the Trial Judge himself, not to say the jury, never achieved a rational mastery of the factual issues and the proofs. In addition to the instances in the record previously cited which evinced the Trial Court's dismay (and the prosecution's own confusion) over the labyrinthine posture of the charges and the proofs see, e.g., in the Government's printed Appendix, 205a-213a, 237a-238a; see also Tr. 667-668, 813-814, 845-847, 1148-1149; and see, in appellants' Appendix, D158a, 160a-161a. Even after the Trial Judge had dismissed the conspiracy counts he at one point apparently forgot that he had done so and was on the point of admitting additional evidence on the conspiracy theory (Tr. 1148-1149). The dismissal of all but a tiny fraction of the counts as against this petitioner did not relieve the situation, of course, because, as seen, all of the evidence stayed in the case as submitted to the jury.

The Government's reasons for wanting the indictment drawn and the case tried in this way are not difficult to surmise. Conspiracy, the "prosecutors darling", was of course to be expected here. But by the intermingling of conspiracy with aiding-and-abetting, and by the mountainous piling up of hundreds upon hundreds of substantive counts ostensibly cementing together what ultimately turned out to be the

quite distinct segments of the several defendants' alleged criminal activities, the Government in this case forged a prosecutive weapon that could fail of its blunder-buss targets only if the Courts interfered as a matter of law and procedural justice.

In view of all of the foregoing, we respectfully submit that the District Court's refusal to consider Campisi's motion for severance at the outset of the trial on the ground of untimeliness was an abuse of discretion; and that this Court's decision to the contrary should be reconsidered.

But, in any event, we urge also that the points here in question partake of the quality of due process constitutionality, so that the defense motion was not one that could be waived in the manner asserted by the Trial Court and by this Court but was in the nature of a motion addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12.

We acknowledge that we have found no case dealing with the precise combination of issues presented by the form of the present indictment and the trial consequences thereof in this case. However, we think that on the score of the prodigiously multiple counts alone, the decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218 points to the unacceptability in principle, of indictments of this portentously over awing type which cannot be effectively handled by a jury or fairly defended against by accused persons. In the very few cases we have found where objections against such indictments have been made on due process grounds, the denial of such constitutional objections occurred with respect to indictments which contained not remotely so many counts as this one, and without the presence of the other aggrieving factors which exist in this case. E.g., *People* v. *Allen*, 352, Ill. 262, 185 N.E. 605 (1933) (16 Counts).

Apart from the point above urged as to the due process aspect of the situation, this Court should reconsider the case

on the issue of misjoinder and rights of severance on the distinct ground of the impact of the dismissal of the conspiracy counts. Cf. *Schaffer* v. *United States*, 362 U.S. 511, 516. As we believe was demonstrated above, it would have been a correct ruling by the Trial Court to have expressly dismissed the conspiracy count affecting Campisi (Count 540) for failure of proof. Therefore, under the rule of the *Schaffer* case, *supra*, the Trial Judge had "a continuing duty * * * to grant a severance if prejudice does appear". Against the background in recent decades of the distressing deterioration of standards of fair trial and fair proof in federal prosecutions where the Government resorts to the conspiracy dragnet, the presentation upon the instant record of the aforementioned issue which the Supreme Court so recently revitalized in the *Schaffer* case, and in view also of the total circumstances of the Government's overreaching prosecutive procedures in this case, we submit that the *Schaffer* issue alone, without more, merits the granting of rehearing in this case for the sake of preserving the fair administration of federal criminal justice.

WHEREFORE, it is respectfully prayed that this petition for rehearing should be granted.

Respectfully submitted,

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Certificate

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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Dated: October 1, 1962